

66 FLRA No. 156

UNITED STATES
 DEPARTMENT OF THE ARMY
 U.S. ARMY MATERIEL COMMAND
 U.S. ARMY RESEARCH DEVELOPMENT
 AND ENGINEERING COMMAND
 U.S. AVIATION AND MISSILE RESEARCH
 DEVELOPMENT AND ENGINEERING
 CENTER (AMRDEC)
 REDSTONE ARSENAL, ALABAMA
 (Agency)

and

AMERICAN FEDERATION
 OF GOVERNMENT EMPLOYEES
 LOCAL 1858
 (Labor Organization/Petitioner)

AT-RP-11-0030

ORDER DENYING
 APPLICATION FOR REVIEW

July 27, 2012

Before the Authority: Carol Waller Pope, Chairman, and
 Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This case is before the Authority on an application for review (application) filed by the Union under § 2422.31 of the Authority's Regulations, seeking review of the Regional Director's (RD) decision denying a petition for clarification of its unit to include one position.¹ The Agency did not file a response.

¹ Section 2422.31 of the Authority's Regulations provides, in pertinent part:

(c) *Review*. The Authority may grant an application for review only when the application demonstrates that review is warranted on one or more of the following grounds:

- (1) The decision raises an issue for which there is an absence of precedent;
- (2) Established law or policy warrants reconsideration; or,
- (3) There is a genuine issue over whether the Regional Director has:
 - (i) Failed to apply established law;
 - (ii) Committed a prejudicial procedural error;
 - (iii) Committed a clear and prejudicial error concerning a substantial factual matter.

The Regional Director (RD) found that the incumbent of the disputed position (the incumbent) is a confidential employee within the meaning of § 7103(a)(13) of the Federal Service Labor-Management Relations Statute (the Statute) and ordered, pursuant to § 7112(b)(2) of the Statute (§ 7112(b)(2)), that the bargaining unit be clarified to exclude the position.²

For the reasons that follow, we deny the Union's application for review.

II. Background and RD's Decision

The Union filed a petition seeking clarification of the bargaining unit status of the Secretary (the position) to the Executive Director (Executive Director) of Aviation and Missile Research Development and Engineering Center (AMRDEC), Redstone Arsenal, Alabama. In response, the Agency argued that, because the incumbent has access to confidential and privileged information, including correspondence and discussions related to the Executive Director's involvement in labor-management relations, the position is excluded from the bargaining unit pursuant to § 7112(b)(2) as a confidential employee. RD's Decision at 4.

The RD found that the Executive Director "handles the budget, the leadership, strategic directions, removal[s and third] step grievance decisions, policies and labor relations for AMRDEC." *Id.* at 3. The RD also found that the incumbent was temporarily promoted to the position on November 23, 2008 to run through January 2010 and was permanently promoted to the position on January 17, 2010. *Id.* The RD found that the "majority" of the incumbent's work is "running [the Executive Director's] schedule and calendar which includes labor-management meetings." *Id.* The RD found that, while the incumbent "does not actually attend the labor-management meetings, . . . she sits outside of [the Executive Director's] office during the meetings and takes notes." *Id.* The RD noted that, although the incumbent does not advise the Executive Director, she "may discuss the labor meetings with [him] and offer her opinion." *Id.* He also found that the Executive Director sends the incumbent "information/notes regarding the labor meetings to keep in a file." *Id.* The RD further found that the incumbent: (1) "prepares, proofs, and approves correspondence" for the Executive Director; (2) receives "everything, including grievances and personnel matters," that

² Section 7112(b)(2) of the Statute excludes from a bargaining unit "a confidential employee." 5 U.S.C. § 7112(b)(2). Section 7103(a)(13) of the Statute defines a "confidential employee" as "an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations." 5 U.S.C. § 7103(a)(13).

requires the Executive Director's signature; (3) keeps confidential files, including grievance reports; and (4) handles classified documents. *Id.* Moreover, the RD found that the incumbent "has a locked file, a key to [the Executive Director's] office and, . . . the combination to the safe that's locked in a room in the office suite." *Id.* at 4.

Applying Authority precedent, the RD found the incumbent is a confidential employee within the meaning of § 7103(a)(13) of the Statute. According to the RD, the record established that the incumbent works under the supervision of the Executive Director. The RD found that the Executive Director "formulates and effectuates management policy in the field of labor relations" and "has the final decision on policies, personnel and labor matters." *Id.* at 6. The RD rejected the Union's contention that the position has never been confidential, finding that the record showed that the incumbent's duties include administrative support and coordination of the Executive Director's schedule, as well as the handling and keeping of confidential files. *Id.* The RD further found that, although the incumbent "does not attend all of the labor-management meetings, she discusses [such] meetings with [the Executive Director] and . . . handles [his] correspondence, which includes notes regarding meetings, investigations, disciplinary actions, personnel matters and grievances." *Id.* The RD thus found that the record evidence demonstrated that the incumbent "acts in a confidential capacity to an individual who formulates or effectuates management policy in the field of labor-management relations." *Id.*

III. Union's Application for Review

The Union asserts that review is warranted because the RD "committed a clear and prejudicial error concerning a substantial factual matter." Application at 1.

Specifically, the Union asserts that the RD erred in finding that the Executive Director supervises six other SES employees. *Id.* According to the Union, the Executive Director only supervises five such employees. *Id.* (citing Application, Attach. 1, AMRDEC Organization).

The Union next contends that the RD erred in finding that the incumbent "was temporarily promoted" to the position "on November 2008 to run through January 17, 2010." *Id.* (quoting RD's Decision at 3). The Union asserts that the incumbent never held the position "for any two year period." *Id.* The Union also asserts that the RD's finding that, "[p]rior to January 2010, [the incumbent] was an [a]dministrative [a]ssistant for several different directors and she rotated to the . . . position on a temporary basis in 2009 under the

previous AMRDEC Director" contradicts his finding that she held such position in 2008. *Id.* (quoting RD's Decision at 3).

The Union also disputes the RD's finding that the incumbent, while not actually attending the labor-management meetings, "sits outside of [the Executive Director's] office during [such] meeting[s] and takes notes." *Id.* at 2 (quoting RD's Decision at 3). According to the Union, the incumbent's office "is located outside and around the corner from [the Executive Director's] office and [her] desk is a good distance from [his] [d]oor." *Id.* Thus, the Union contends, it is "impossible to hear what is being said clearly enough to take notes." *Id.*

The Union also disputes the RD's finding that the Executive Director's "door is not shut during the labor meetings and he is aware that [the incumbent] listens and takes notes of the meetings." *Id.* (quoting RD's Decision at 3). According to the Union, a different employee who was temporarily assigned to the incumbent's position during the relevant time "sat at the same desk and indicated that conversations that took place in [the Executive Director's] office [could not] be heard well enough to take notes." *Id.*

Lastly, the Union contends that the RD's findings -- that the incumbent has a "locked file, a key to [the Executive Director's] office and . . . the combination to the safe that [is] locked in a room in the office suite" and that she "hold[s] classified information] for [the Executive Director] or puts the information in the safe," *id.* at 2 (quoting RD's Decision at 4) -- give "the appearance that [the incumbent] is the only one with keys to [the Executive Director's] office, the safe or the file," *id.* at 3. According to the Union, all secretaries in the Executive Director's "front office have access to the locked file cabinets, classified material, the key to [the Executive Director's] office" and the combination to the safe. *Id.* at 2.

IV. Analysis and Conclusions

The Union asserts that review is warranted because the RD "committed a clear and prejudicial error concerning a substantial factual matter" in finding that the incumbent is a confidential employee. Application at 1. As noted previously, under 5 C.F.R. § 2422.31(c)(3)(iii), the Authority may grant an application for review when the application demonstrates that there is a genuine issue over whether the RD has committed a clear and prejudicial error concerning a substantial factual matter.

An employee is a confidential employee within the meaning of § 7103(a)(13) of the Statute if: (1) there

is evidence of a confidential working relationship between an employee and the employee's supervisor; and (2) the supervisor is significantly involved in labor-management relations. *See U.S. Dep't of Labor, Wash., D.C.*, 59 FLRA 853, 855 (2004) (*DOL*) (Chairman Cabaniss dissenting, in part); *U.S. Dep't of Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Ariz.*, 37 FLRA 239, 244 (1990) (*Yuma*). Among the factors that the Authority considers when assessing whether an individual serves in a confidential capacity are whether the individual: (1) obtains advance information of management's position with regard to contract negotiations, the disposition of grievances, and other labor relations matters; (2) because of physical proximity to their supervisor, overhears discussions of labor-management matters; and (3) has access to, prepares, or types materials related to labor-management relations, such as bargaining proposals and grievance responses. *DOL*, 59 FLRA at 855.

The RD found that the evidence established that the Executive Director formulates and effectuates management policies in the field of labor relations and that the incumbent acts in a confidential capacity with respect to the Executive Director. *See* RD's Decision at 6. In this regard, the RD found that the incumbent's duties include administrative support and coordination of the Executive Director's schedule, as well as handling and keeping confidential files, including grievance reports. *Id.* The RD further found that, although the incumbent "does not attend all of the labor-management meetings, she discusses [such] meetings with [the Executive Director] and . . . handles [his] correspondence, which includes notes regarding meetings, investigations, disciplinary actions, personnel matters and grievances." *Id.* These findings support the RD's conclusion that the incumbent is a confidential employee within the meaning of § 7103(a)(13) of the Statute. *See, e.g., Yuma*, 37 FLRA at 247-48; *see also DOL*, 59 FLRA at 855.

The Union has not provided any basis to conclude that the RD committed a clear and prejudicial error with respect to these findings. In this regard, the Union asserts that the RD was clearly in error in finding that the Executive Director supervises six SES employees. Application at 1. But the organizational chart submitted by the Union actually supports the RD's finding. *See id.*, Attach. 1, AMRDEC Organization. Further, even if such finding was erroneous, the Union has failed to show how this fact prejudiced the Union.

The Union also asserts that the RD erred in finding that the incumbent was temporarily promoted to the position on November 23, 2008 to run through January 17, 2010, and that she rotated to the position on a temporary basis in 2009. *See id.* The Union has failed to explain how, even assuming these factual findings were

erroneous, it was prejudiced by them, particularly given eligibility determinations are based on an employee's actual duties at the time of the hearing. *See, e.g., Yuma*, 37 FLRA at 245.

The Union next disputes the RD's finding that the incumbent, while not actually attending the labor-management meetings, "sits outside of [the Executive Director's] office during [such] meetings and takes notes." Application at 2 (quoting RD's Decision at 3). According to the Union, the location of the incumbent's office makes it "impossible to hear what is being said clearly enough to take notes." *Id.* Similarly, the Union disputes the RD's finding that the Executive Director's "door is not shut during the labor meetings and he is aware that [the incumbent] listens and takes notes of the meeting." *Id.* (quoting RD's Decision at 3). The Union contends that a different employee testified that "conversations that took place in [the Executive Director's] office [could not] be heard well enough to take notes." *Id.* at 2. The record shows that relevant employees were all interviewed during the RD's investigation of the petition, and the RD considered any conflicting statements with respect to this issue. The Union's assertions thus challenge the weight that the RD attributed to this evidence. As a result, they do not provide a basis for concluding that the RD committed clear errors in making factual findings. *See, e.g., U.S. Dep't of Veterans Affairs, N. Cal. Health Care Sys., Martinez, Cal.*, 66 FLRA 522, 525 (2012) (Member Beck dissenting on other grounds) (citations omitted).

The Union further contends that the RD's findings -- that the incumbent has a "locked file, a key to [the Executive Director's] office and . . . the combination to the safe that [is] locked in a room in the office suite" and that she "hold[s] classified information] for [the Executive Director] or puts the information in the safe" -- give the appearance that the incumbent is the only one with keys to the Executive Director's office, safe, and file. Application at 2 (quoting RD's Decision at 4); *see also id.* at 3. According to the Union, all secretaries in the Executive Director's "front office have access to the locked file cabinets, classified material, the key to [the Executive Director's] office" and the combination to the safe. Application at 2. The Union has not pointed to any information in the record that supports this claim. Moreover, the Union has failed to show that the RD's findings with respect to the incumbent are erroneous. Accordingly, this contention also provides no basis for finding that the RD committed a prejudicial error.

Additionally, the Union asserts that the incumbent: (1) "does not perform personnel work in other than a clerical capacity"; (2) "is not engaged in contract negotiations or disposition of grievances"; (3) "does not participate in meetings involving

labor-management matters”; and (4) is “not privy to pre-decisional, confidential information concerning labor-management . . . matters.” *Id.* at 1, 2. The Union further states that it “[has] reason to believe that she is not an employee within the meaning of [§] 7103(a)(13)” of the Statute. *Id.* at 2. To the extent that these claims are separate from the Union’s overall argument that the incumbent is not a confidential employee, we reject such claims as bare assertions. *See, e.g., U.S. Dep’t of the Interior, Bureau of Land Mgmt., Nev. State Office, Reno, Nev.*, 66 FLRA 435, 436 (2012); *U.S. Dep’t of the Navy, Naval Facilities Eng’g Command Mid-Atlantic, Norfolk, Va.*, 65 FLRA 272, 280 n.4 (2010).

Accordingly, we find that the Union has not established that the RD committed clear and prejudicial errors concerning substantial factual matters.

V. Order

The Union’s application for review is denied.